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No. 87-32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RICHARD W. MOREY and
DIANA W. MOREY,

Petitioners,

v.

BARRINGTON PRESS, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Whether this Court should exercise its extraordinary and discretionary jurisdiction to resolve the existing conflict between the circuit courts of appeals regarding the appealability of a district court judgment finally disposing of the merits and awarding but not quantifying attorney's fees.

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COUNTERSTATEMENT OF CASE

This diversity action arose out of a contract dispute over the sale of a publishing business. The respondent, Barrington Press, Inc., sued the petitioners, Richard and Diana Morey, for the balance due on four promissory notes. The petitioners defended on the grounds that the contract was void due to fraudulent inducement and counterclaimed for fraud and damages. The district court found for the respondent in all respects, ordering payment of the balance

of the contract price for the publishing business, plus interest and attorney's fees. *Barrington Press, Inc. v. Morey*, No. 81 C 1669 (N.D. Ill. April 22, 1983). The district court, however, did not determine the amount of these fees, reserving jurisdiction to do so at a later date.

The petitioners thereafter filed a Rule 59(e) motion to alter or amend the judgment, which was denied. The petitioners then appealed the district court's judgment order and its order denying the petitioners' Rule 59(e) motion. In *Barrington Press I* (*Barrington Press, Inc. v. Morey*, 792 F.2d 307 (7th Cir. 1985)), the Seventh Circuit affirmed the district court's judgment which included the award to the respondent of reasonable attorney's fees. The mandate of that court affirming the judgment was a direction to the district court to determine the amount of the fees, entitlement to which had already been awarded. The petitioners, however, persuaded the district court that it could re-examine the merits of the respondent's entitlement to attorney's fees, and that, under the facts of the case, the award was contrary to the law of Illinois. The district court thus declined to award attorney's fees. *Barrington Press, Inc. v. Morey*, 635 F.Supp. 1257 (N.D. Ill. 1986).

In *Barrington Press II* (*Barrington Press, Inc. v. Morey*, 816 F.2d 341 (7th Cir. 1987)), the Seventh Circuit reversed the district court. In reaching its decision, the court made the following conclusions: the district court's reservation of the determination of the amount of attorney's fees did not deprive the initial judgment of finality; the respondent's entitlement to attorney's fees, applying the law of Illinois, was resolved by the district court's judgment and affirmed by the *Barrington Press I* panel, thus becoming the law of the case; and the petitioners' contention, that the respondent was not entitled to attorney's fees under the notes because it proceeded other than by way

of confession of judgment, was raised too late. Reasoning that the case remained in the same posture as it had after judgment was entered, the *Barrington Press II* panel remanded the cause to the district court for a determination of a reasonable attorney's fee incurred in the collection of the amount for which the petitioners were liable as provided in the promissory notes.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THE PETITIONERS DO NOT ALLEGE A SPECIAL AND IMPORTANT REASON FOR GRANTING THE WRIT OF CERTIORARI.

United States Supreme Court Rule 17 provides that "review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17.1. This Rule "embodies the criteria, developed ever since the Evarts Act of 1891, by which the Court determines whether a particular case merits consideration, with due regard to the proper functioning of the limited reviewing power to which th[e] Court is confined, decisively restricted through the creation of the intermediate Courts of Appeals and more largely confined by the Judiciary Act of 1952." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1954). In illustrating the character of reasons which may be deemed "special and important," the Rule refers to cases when a federal court of appeals has rendered a decision "in conflict with the decision of another federal court of appeals on the same matter" and

when a federal court of appeals has decided a federal question "in a way in conflict with applicable decisions of th[e] Court." Sup. Ct. R. 17.1(a)(c).

In an effort to invoke this Court's jurisdiction, the petitioners point to the "irreconcilable conflict in the decisions of the circuit courts of appeals concerning the question presented in this petition." A conflict between circuits, however, does not mean an automatic grant of certiorari. Indeed, the Court has denied certiorari in a number of cases where a clear conflict between circuits existed. *See, e.g., Sanson v. United States*, 467 U.S. 1264 (1984); *Michael v. United States*, 454 U.S. 75 (1981); *Maryland v. Marzullo*, 435 U.S. 1011 (1977); *Bailey v. Weinberger*, 419 U.S. 953 (1974); *Freeman v. Flake*, 405 U.S. 1032 (1972).

Although Rule 17.1 does not speak of conflicts as to matters of importance, the Court has indicated that it will not grant certiorari "except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). The respondent submits that the procedural question presented in this petition lacks sufficient general importance to merit review by this Court. First, the inconsistency between the view of the Second, Third, Fifth, Eighth, and Eleventh Circuits on the one hand, and the view of the Sixth, Seventh, Ninth, and Tenth Circuits on the other, has not created any conflict or confusion *within* those circuits. Because counsel in each of these circuits is familiar with the manner in which merits decisions and fee decisions will be treated for appeal purposes, uniformity of decision among the federal courts of appeals, one of the purposes of this Court's certiorari jurisdiction, is

not required. Second, there is no real and embarrassing conflict between the circuit courts of appeals. Both views are supported by competing policy considerations which cannot be perfectly resolved, i.e., certainty, efficiency, judicial economy, and fairness to the litigants. The conflict, therefore, is merely a permissible difference of opinion. In light of the above standards, the petitioners' claim of conflict of decisions among the circuits is insufficient for this Court to exercise its extraordinary jurisdiction.

In a further attempt to persuade this Court to exercise its discretionary power of review, the petitioners claim that the Sixth, Seventh, Ninth, and Tenth Circuits' position, that the failure of a judgment on the merits to include the amount of attorney's fees does not prevent the judgment from being final and appealable, is in conflict with the Court's decision in *White v. New Hampshire Department of Employment Security*, 455 U.S. 445 (1982). Relying on dictum from *Exchange National Bank of Chicago v. Daniels*, 763 F.2d 286 (7th Cir. 1985), the petitioners argue that the Seventh Circuit "is only paying lip service to the opinion in *White* and has, in fact, discarded its teachings."

The precise question posed in *White* was whether a post-judgment request for attorney's fees under the Civil Rights Attorney's Fees Awards Act of 1976 (42 U.S.C. §1988), filed four and one-half months after entry of judgment, was a motion to alter or amend the judgment subject to Federal Rule of Civil Procedure 59(e), which requires that such motions be filed within 10 days of the entry of judgment. The Court answered this question in the negative, relying on the following propositions: Rule 59(e) was intended to apply only to requests for reconsideration of matters properly encompassed in a decision on the

merits; a request for attorney's fees under §1988 raises legal issues collateral to and separate from the decision on the merits—issues that cannot be resolved until after one party has finally prevailed on the merits; and attorney's fees are distinguishable from other forms of judicial relief. *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 451-52 (1982).

Although questions of appealability were not directly involved in *White*, the Court realized that one necessary consequence of characterizing requests for statutory attorney's fees as separate from and collateral to judgment on the merits is that the dependency of such request can have no effect on the finality, and thus the appealability, of a judgment finally disposing of the merits of the case. *White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 453 n.14 (1982) ("[T]he collateral character of the fee issue establishes that an outstanding fee question does not bar recognition of a merits judgment as 'final' and 'appealable'."). The Court's endorsement in footnote 14 of those decisions holding that a judgment may be final for appeal purposes prior to entry of a fee award prompted the Sixth, Seventh, Ninth, and Tenth Circuits to apply *White* as a bright-line rule governing all disputes over attorney's fees. Accordingly, the principles and reasoning enunciated by the court in *White* support, if they do not establish, the proposition espoused by the Sixth, Seventh, Ninth, and Tenth Circuit Courts of Appeals. The petitioners' contention that the Seventh Circuit is in conflict with *White* is without merit and their writ of certiorari should, therefore, be denied.

II.

THIS COURT LACKS JURISDICTION TO REVIEW THE MERITS OF THE WRIT BECAUSE THERE IS NO JUSTICIABLE CASE OR CONTROVERSY IN EXISTENCE.

The jurisdiction of the federal courts is limited by Article III of the Constitution to a justiciable "case or controversy," which case or controversy must exist at every stage of appellate or certiorari review. *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). It is well recognized that "the oldest and most consistent thread in the federal law of justiciability is that the federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (quoting C. Wright, Federal Courts 34 (1963)). An advisory opinion is one "which cannot affect the rights of the litigants in the case." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971).

Relying on decisions from the Second, Third, Fifth, Eighth, and Eleventh Circuit Courts of Appeals, the petitioners maintain that when attorney's fees are an integral part of the merits of the case, an order of the district court is not a final decision within the meaning of 28 U.S.C. §1291 unless that order includes a determination of the amount of the fees. The petitioners contend that the district court's failure to set the amount of attorney's fees before the entry of judgment precluded the *Barrington Press I* panel from exercising §1291 jurisdiction. Because the *Barrington Press I* appeal was not perfected under the final decision rule of §1291, the petitioners assert that the law of the case doctrine does not bar reconsideration of the merits of the respondent's entitlement to a fee.

Contrary to the petitioners' position, even if this Court were to grant certiorari and hold that the *Barrington*

Press I panel lacked appellate jurisdiction of the district court's judgment, the petitioners will be precluded on remand from challenging the respondent's *entitlement* to attorney's fees. The *Barrington Press II* panel foreshadowed this result when it stated:

> "Defendants did not contest the award of attorney's fees before the district court prior to judgment, nor in their Rule 59(e) motion to amend the judgment in other respects. *Had they raised it on appeal in Barrington Press I, this court may well have held it had been waived.* See *Lazzara v. Howard E. Esser, Inc.*, 802 F.2d 260, 268 (7th Cir. 1986) (arguments made on appeal were untimely because they had not been raised in the district court); *Haynes v. United States*, 418 F.2d 1380, 1382 (Ct. Cl. 1969) ('[i]t is a general rule of law that failure to preserve an error, either at the trial level or before an appellate court, will cause that point to be lost for any subsequent appeal')." *Barrington Press, Inc. v. Morey*, 816 F.2d 341, 343 (7th Cir. 1987) (Petitioners' Appendix A, at A-4) (Emphasis added).

The petitioners have therefore waived any right they may have had to present on a subsequent appeal the argument that the respondent is not entitled to attorney's fees. Because the legal issue sought to be resolved by the petition for writ of certiorari is a mere declaration of law without implications for practical enforcement upon the parties, a decision by this Court on the merits, i.e., that a district court judgment awarding but not quantifying attorney's fees is or is not a final, appealable order, would be tantamount to rendering an advisory opinion in violation of the constitutional stricture. For this reason alone, the petition for writ of certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, the respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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